Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

RUDOLPH SANTOBELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Due Process of Law violated by the use, as trial evidence against petitioner, of the guilty pleas of two co-defendants?

2. Were the jury instructions on the RICO charges erroneous, and was the error of constitutional magnitude?

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OPINION BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, Dated March 14, 1996, is submitted herewith as *Appendix "A"*.

JURISDICTION

This matter is On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The Judgment of that Court was entered March 14, 1996.

The statutory provision conferring upon this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C.A. sec. 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

Petitioner was denied Due Process of Law pursuant to the dictates of the Fifth Amendment to the United States Constitution which states in relevant part:

> "No person shall be held to answer . . . . . , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner appealed from a Judgment entered in the United States District Court for the Southern District of

New York (Hon. Robert Patterson), on March 27, 1995, finding him guilty of RICO Conspiracies and other assorted crimes, and his sentence 78 months incarceration, a 3 year Supervised Release Term, a fine of $50,000, and a Special Assessment of $500.

In a Summary Order dated March 14, 1996, the United States Court of Appeals for the Second Circuit affirmed the judgment of Conviction.

The Indictment [A23-48] in Count One charged petitioner, Daniel Cilenti and Charles DeSalvo with a RICO Conspiracy in violation of 18 USC, section 1961. Racketeering Act One [paragraph "10" of the Indictment] involved a Conspiracy to Make Extortionate Extensions of Credit, Conspiracy to Collect Extortionate Extensions of Credit, and Financing Extortionate Extensions of Credit. Racketeering Act Two [paragraph "11" of the Indictment] charged the operation of an illegal gambling business, the crap game at 2500 Arthur Avenue. Racketeering Act Three [paragraph "12" of the Indictment] charged the operation of illegal bookmaking establishments at 2405 Southern Boulevard, and 632 East 186th Street. Racketeering Act Four [paragraph "13" of the Indictment] charged the illegal operation of a bookmaking business at 844 Morris Park Avenue. Racketeering Act Five [paragraph "14" of the Indictment] charged an illegal numbers operation at Club Arthur.

Count Two of the Indictment charged petitioner with Racketeering in violation of Title 18, United States Code, Section 1962(c). Count Two incorporated by reference paragraphs 1 - 7, and 9 - 14, of the RICO Conspiracy set forth in Count One.

Count Three of the Indictment charged petitioner and Daniel Cilenti with a Collection of Unlawful Debts Conspiracy involving usurious loan to Richard Garibian, and to "victim" #1, in violation of Title 18 USC, section 1962(d).

Count Four charged petitioner and Daniel Cilenti with a Conspiracy to Make Extortionate Extensions of Credit in violation of Title 18 USC, sections 891 & 892.

Count Five charged petitioner and Daniel Cilenti with a Conspiracy to Collect Extensions of Credit by Extortionate Means in violation of Title 18 USC sections 891 & 894.

Count Six charged petitioner and Daniel Cilenti with Financing Extortionate Extensions of Credit in violation of Title 18 USC sections 891, 893 & 2.

Count Seven charged petitioner and Daniel Cilenti with Use of Extortionate Means to Collect an Extension Credit in violation of Title 18 United States Code, sections 891, 894 & 2.

Count Eight charged petitioner, Charles DeSalvo, Benjamin Castellazzo, Vito Raguso, Joseph Sarcinella and Joseph Silvestri with a Gambling Conspiracy in violation of Title 18 USC section 371.

Count Nine charged petitioner and Charles DeSalvo and Benjamin Castellazzo with running an illegal craps game at 2500 Arthur Avenue in violation of Title 18 USC sections 1955 & 2.

Count Ten charged petitioner, Joseph Sarcinella and Joseph Silvestri with running bookmaking operations at

2405 Southern Boulevard, and 632 East 186 Street, in violation of Title 18 USC sections 1955 & 2.

Count Eleven charged petitioner, Charles DeSalvo and Vito Raguso with running a bookmaking operation at 844 Morris Park Avenue, in violation of Title 18 USC sections 1955 & 2.

Count Twelve charged petitioner and others known and unknown with running an illegal numbers operation headquartered at 2343 Arthur Avenue in violation of Title 18 USC, sections 1955 & 2.

Initially the FBI surveilled a number of locations in the Bronx over a number of years for evidence of a gambling operation allegedly run by the "Genovese" crime family. The focus of the FBI activity was modified when an individual named Jeff Regan complained to law enforcement agents on February 4, 1993, that he was being shaken down to repay an usurious loan extended by Richard Garibian in the amount of $25,000, at four points per week. Consequently, Garibian was arrested by the FBI on February 12, 1993, and he agreed to cooperate with the Government.

Garibian had a lengthy history of criminal activity. Initially to supplement his income from car sales and a gasoline business, Garibian involved himself in a numbers business at 187th Street and Arthur Avenue under Frank Locasio, and Garibian's father-in-law Frank Mazzariello in the late 1970's.

In February, 1991, it was Frank Mazzariello who introduced petitioner to Garibian in a coffee shop on Arthur Avenue. At that initial encounter Garibian asked

petitioner if he could borrow $60,000, and petitioner agreed. Subsequently, Garibian and James Gay met with petitioner and asked to borrow not $60,000, but $100,000. However, the additional $40,000 requested was never lent to Garibian. Of the $60,000 borrowed, Garibian only repaid $19,340. Petitioner specifically told Garibian with respect to the $60,000 loan as testified to by Garibian:

> "He said he didn't care what I wanted the money for so long as he got it back."

Garibian also testified:

> "Rudy said he's not a violent man, he don't believe in violence."

After Garibian's arrest the FBI began investigating petitioner regarding usury, and that investigation dovetailed with the FBI's ongoing investigation into illegal gambling by petitioner and others.

The FBI directed Garibian to make and record several phone conversations and face to face meetings with petitioner and co-defendant Cilenti between April 10, 1993 and June 10, 1993. In many of Garibian's taped telephone conversations with co-defendant Cilenti, Cilenti ordered Garibian to secrecy and duplicity, and not to tell petitioner about payments on the loan that Garibian had made to Cilenti directly. Garibian was also advised by Cilenti that petitioner would never do anything to assist Garibian concerning his repayment problems with Skeens and Black. No evidence existed that petitioner ever forced or even encouraged Garibian to repay petitioner's loan to Garibian within a particular time frame.

REASONS FOR GRANTING THE WRIT

REASON ONE: The guilty pleas of co-defendants Sarcinella and Cilenti were inadmissible as evidence of petitioner's guilt. Additionally, the Government's cut and paste job on Cilenti's and Sarcinella's guilty pleas as evidence of the enterprise, conspiracy and gambling operations charged in the Indictment was violative of any standard of fundamental fairness. Lastly, the entire plea transcripts should have been read to the jury.

On September 13, 1994, Daniel Cilenti plead guilty under amended Counts Three, Four, Five, Six and Seven of a Superseding Indictment [A246-52]. Count Three charged Unlawful Debts Conspiracy; Count Four charged Conspiracy to make Extortionate Extensions of Credit; Count Five charged a Conspiracy to Collect Extensions of Credit by Extortionate Means; Count Six charged Financing Extortionate Extensions of Credit; and Count Seven charged the Use of Extortion to Collect Credit. Co-defendant Cilenti specifically refused to plead to the enterprise charged in that Indictment [A209]. Mr. Cilenti then read into the record his plea allocution to an amended version of Count Three [A209-212], and specifically stated [A211]:

> THE DEFENDANT: I specifically declined to name any other individuals, nor this ple – nor does this plea acknowledge the role of any specific individual. My plea of guilty to conspiring with an association in fact is not an admission of my membership in any organized crime family."

The Indictment specifically charged the Genovese Crime Family as the RICO enterprise [A23-24]. The Indictment did not charge any generic association in fact. Mr. Cilenti plead guilty to some association in fact with

unnamed others, not the enterprise repeatedly charged in the Indictment. [A215] Defendant Cilenti's plea allocution as to Count Three was incorporated in his guilty plea as to Counts Four, Five, Six and Seven. [A220] The Government [A220], and the Court accepted Cilenti's guilty plea pursuant to that limited proffer [A221]. Cilenti's particular guilty plea was a contract entered into by the Government with its eyes open, and to its satisfaction.

On September 16, 1994, Joseph Sarcinella plead guilty to generic offenses named in Counts Eight and Ten of the Indictment [A224-245]. Count Eight charged a Gambling Conspiracy, and Count Ten charged Bookmaking. The Court advised Sarcinella that he had a right to counsel in the criminal proceeding. Then, with regard to Count Eight, and while standing beside Sarcinella in open Court, Sarcinella's attorney advised the Court as follows regarding Sarcinella's guilty plea: [A237,242]

> "MR. RICHMAN: Respectfully, your Honor, my client was part of the conspiracy, but not with Mr. Santobello or with Mr. Raguso or Mr. Disanto or Mr. Castellazzo or Mr. Petrenicola. We do not say anything concerning Mr. Silvestri because – "

In response to Mr. Richman's statement of limitation, the Court then advised Mr. Sarcinella with regard to Count Eight [A238-39]:

> "Now for the purposes of this plea, the essential elements of the crime against you are that you entered into a conspiracy with other persons, and second, that the object of that conspiracy was to conduct an illegal gambling business . . . "

Thereafter, Sarcinella entered his guilty plea under the amended Count Eight to being a member of a generic illegal gambling conspiracy, but not to the specifically delineated conspiracy in petitioner's Indictment. [A239-40] That amended plea was accepted by, and adopted by the Government and the Court [A240-41].

Prior to Sarcinella's guilty plea to Count Ten [Bookmaking], and while standing beside Sarcinella before the Court, Sarcinella's attorney advised the Court as follows regarding Sarcinella's guilty plea, and the Court and Sarcinella responded [A242-43]:

> "MR. RICHMAN: Your Honor, my client wishes specifically to state that Mr. Santobello had nothing to do with the operation, but that he is pleading guilty without Mr. Santobello's involvement.
>
> THE COURT: Well, all right, I understand, but how does he plead to the charge?
>
> THE DEFENDANT: Guilty."

Sarcinella's guilty plea to the Amended Count Ten was then accepted by the Government and the Court [A245]. Said statement by the attorney must be attributable to Sarcinella as made in the course of his guilty plea as an adoptive admission pursuant to Rule 801(d)(2)(B), or as an authorized admission pursuant to Rule 801(d)(2)(C) of the Federal Rules of Evidence. The attorney was clearly the agent of Sarcinella with regard to that statement, and the guilty plea proceedings. The attorney clearly had the authority to so act on behalf of Sarcinella, and the statement by the attorney was made in the course of exercising that authority.

The statement by the attorney [who is without doubt Sarcinella's agent for entry of the guilty plea] is also chargeable vicariously as part of Sarcinella's guilty plea statement under Federal Rule of Evidence 801(d)(2)(D). See, *Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir.), cert. denied, 107 S.Ct. 591 (1986) [an opening statement made by an attorney is admissible in a later lawsuit against his client, and that statements made in a pleading in a prior case are admissible, and a plaintiff could be questioned about them]; *United States v. Harris*, 914 F.2d 927 (7th Cir. 1990) [statements by defendant's former counsel, who had been investigating a mistaken identity theory, can be admitted against the defendant as a vicarious admission]; *United States v. Sanders*, 979 F.2d 87 (7th Cir. 1992), cert. denied, 113 S. Ct. 2376 (1993) [attorney's statements are admissible against his client under Rule 801(d)(2)(D); *Sunykong Int'l, Inc. v. Anderson Land and Livestock Co.*, 828 F.2d 1245 (8th Cir. 1987) [an abandoned or superseded pleading may be introduced into evidence as the admission of a party]; *United States v. Flores*, 679 F.2d 173 (9th Cir. 1982), cert. denied, 459 U.S. 1148 (1983) [a letter in which the defendant's attorney admitted the defendant's ownership of the gun was properly introduced].

At petitioner's trial, over vigorous opposition, the Court admitted into evidence the government's cut and paste transcript of Sarcinella's guilty plea, and excluded that portion of the record reflecting the attorney's statement on the theory that the attorney's statement was not binding upon Sarcinella. Both Sarcinella and Cilenti had previously appeared with counsel at petitioner's trial and indicated to the trial judge that because they had not

been sentenced, if called to testify by the petitioner, both Sarcinella and Cilenti would exercise their Fifth Amendment right and refuse to testify.

At no time was the jury advised that defendants Cilenti and Sarcinella specifically and deliberately did not plead guilty to the specific charges contained in the Indictment against Santobello, but only plead guilty to having committed the same type offenses in an unrelated generic way. The Government's cut and paste job on the guilty plea transcripts was deliberately misleading, and intended to hide from the jury that the specific enterprises, conspiracies and conduct of illegal gambling involving 5 or more persons, charged in the Indictment for which Santobello and others were then on trial, were not the same enterprises, conspiracies and illegal gambling businesses which formed the basis of Cilenti's and Sarcinella's incriminating statements made in the course of their guilty pleas.

After the Government prosecutor read said redacted guilty pleas to the jury, the Court instructed the jury that it could consider the guilty pleas as follows [A257-58]:

> "You may consider the statements by Mr. Cilenti and Mr. Sarcinella in determining whether there was an enterprise or association in fact; and B, whether there were conspiracies or agreements to collect unlawful debts, to make or collect unlawful extensions of credit, and to conduct illegal gambling businesses. . . . '
>
> 'Again, statements of Mr. Cilenti and Mr. Sarcinella may only be considered by you as evidence of the existence of the enterprise or

> association in fact, or the existence of the conspiracies I have described . . . "

The Court's charge at the conclusion of summations also instructed the jury that the redacted guilty pleas could be used as evidence to prove the existence of the conspiracies, enterprises and illegal gambling businesses specifically charged in the Indictment, but the jury could not use them as evidence to prove membership of any defendant on trial in those conspiracies, enterprises and illegal gambling businesses [A70-71].

The United States Supreme Court in *Williamson v. United States*, 114 S. Ct. 2431 (1994) changed previous Second Circuit law which gave the definition of a "statement" pursuant to Rule 804(b)(3), broad interpretation. The Supreme Court has held that when Rule 804(b)(3) refers to a "statement" against the declarant's interest, it refers only to that part of the statement that specifically inculpates the person making the statement. Other remarks made within a generally self-inculpatory statement are not admissible whether classified "collateral," "neutral," "non-self-incriminatory," or otherwise.

Cilenti's and Sarcinella's guilty pleas could be admissible only against them, and could not be used to prove that the existence of the specific conspiracies, enterprises and illegal gambling businesses which were contained in the charges against petitioner Santobello. As to those charges, Cilenti's and Sarcinella's statements were excludable hearsay. Cilenti and Sarcinella did not admit their guilt to the specific enterprise and conspiracy charged against petitioner. When the jury retired to deliberate, the first of many notes they sent to the Court was a

request for copies of the Sarcinella and Garibian guilty pleas to review during deliberations.

Additionally, a criminal defendant is entitled to a charge from the Court which reflects his theory of the case. See, *United States v. Johnson*, 994 F.2d 980, 988 (2d Cir.), cert. denied, 114 S. Ct. 418 (1993). One petitioner defense at trial was that a divergence of proof existed between the conspiracy and enterprise charged in the Indictment, and the conspiracy and enterprise testified to by Garibian, and further demonstrated by all the trial evidence. Consequently, the Court charged the jury that if it found Sarcinella and Cilenti were members of a different conspiracy or enterprise than charged in the indictment, then it must acquit petitioner [A114].

Despite the Court's knowledge that Sarcinella and Cilenti had plead guilty expressly acknowledging that they were not admitting criminal conduct specifically charged in the Indictment, but to different criminal activity, the Court suppressed those portions of their guilty pleas that would prove a petitioner's defense at trial. Once the Court decided to permit the Government to introduce the guilty plea transcripts of Sarcinella and Cilenti, petitioner alternately and unsuccessfully requested the entire guilty plea transcripts be read to the jury to give the jury an accurate picture of just what those defendants had admitted. The refusal of the Court to let the jury hear the entire transcripts contravenes at minimum the Supreme Court's ruling in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), which provides "the hearsay rule may not be applied mechanically to defeat the ends of justice." See also, *Rivera v. Director, Dept. of Corrections, State of Illinois*, 915 F.2d 280 (CA7, 1990). As

the Supreme Court stated in *Crane v. Kentucky*, 476 U.S. 683 (1986), "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Id.* at 690. The instant Court charged petitioner's defense theory, but withheld from the jury the best evidence of the defense it had recognized by so charging the jury. Furthermore, the exculpatory portions of the Cilenti and Sarcinella guilty pleas were made under circumstances clearly indicating the trustworthiness of these statements so as to satisfy the admissibility requirement of Rule 804(b)(3) of the Federal Rules of Evidence. The guilty pleas of Cilenti and Sarcinella were both entered in open Court, with the same Government prosecutor and defense counsel present, in both instances the defendants were placed under oath under penalty of perjury to tell the whole truth, and each statement corroborated the other.

Repeatedly the Court charged the jury that it had to find beyond a reasonable doubt the existence of the specific conspiracies, enterprise and illegal gambling business set forth in the Indictment, as a factual predicate before the jury could even consider the other elements of the crimes charged in each count of the Indictment. Perversely, the admission of the redacted Cilenti and Sarcinella guilty plea transcripts was used as evidence of the elements of the specific conspiracies, enterprises and gambling businesses charged in the Indictment. It was error and fatally prejudicial for the Court to do that when neither Cilenti or Sarcinella plead guilty to the conspiracies, enterprises and gambling businesses for which Mr. Santobello was on trial. A plea bargain is interpreted

according to the principles of contract law, and the Government accepted the guilty pleas of Sarcinella and Cilenti under very particular circumstances. It cannot be more clearly stated than was done by Cilenti's attorney Jacobs when he appeared at petitioner's trial to inform the Court that Cilenti would exercise his Fifth Amendment privilege if called by petitioner:

> ". . . . It had been my indication from Cilenti at all times that, with respect to the government's subpoena, which is what we are here for, that he would invoke his Fifth Amendment privilege. And, in fact, I think we had been quite clear to the government, and when we took a plea several weeks before your Honor, that Mr. Cilenti, in his allocution made it quite clear that he was not in any way implicating anybody, or stating anybody did anything. And that obviously included Mr. Santobello.
>
> That in no way was his allocution to be an admission that anybody did anything in this case.
>
> And we took the plea under those circumstances, as well as denying the enterprise as charged.
>
> And Mr. Cilenti, with the government's permission, and your Honor's permission, pled to an association in fact.
>
> Mr. Cilenti would now affirm that he's reviewed the matter with me, and to any and all questions on behalf of the government's subpoena he would invoke the Fifth Amendment privilege."

The trial Judge then responded:

> "THE COURT: Your recital of what went on coincides with my recital of what went on at the plea allocution, Mr. Jacobs."

Contrary to law, the Court of Appeals for the Second Circuit at page 4 of its Summary Order ignored the Supreme Court's decision in *Williamson*, supra and held the Sarcinella and Cilenti guilty pleas were properly admitted as trial evidence against petitioner because said guilty plea statements were against the penal interest of Sarcinella and Cilenti.

REASON TWO: The RICO charge on Count Two fatally did not include the requisite language that petitioner must have participated in the operation or management of the enterprise itself before he may be convicted of the crime charged, and such error of constitutional magnitude should not be reviewed under a "plain error" standard.

The trial Court charged the jury that "the first three Counts of the Indictment, which contain 12 counts in this case, charge violations of the Racketeer Influenced and Corrupt Organizations Act often called RICO."

The trial Court specifically charged the jury that Count Two was the substantive offense of the RICO conspiracy charged in Count One [A170]. As the Court instructed the jury as aforesaid, all of the additional ten crimes charged against petitioner, merged in the RICO charges contained in Counts One and Two. Petitioner submits that with regard to the substantive RICO offense charged in Count Two, the Court's charge was fatally outdated and inaccurate. Furthermore, because the Court's charge as to Count Two was wrong, the RICO

conspiracy set forth in Count One, and all of its sub-parts and acts additionally set forth as separate Counts of the instant Indictment must also be reversed. As was held in *United States v. Scotti*, 47 F.3d 1237 (2d Cir. 1995):

> ". . . . common sense and experience tell us that it is more likely that the jury will find a defendant guilty of conspiracy if it also finds him guilty of the substantive offense."

The instant trial Court charged the jury that it must find 5 elements of the crime set forth in Count Two beyond a reasonable doubt [A108]:

1. the enterprise existed;

2. the enterprise affected interstate or foreign commerce;

3. a defendant was associated or employed by that enterprise;

4. a defendant engaged in a pattern of racketeering;

5. a defendant conducted or participated in the conduct of the enterprise through that pattern of racketeering.

With regard to the fifth element the Court charged the jury as follows [A120]:

> "If you find that the fourth element has been satisfied by proof that the defendant engaged in a pattern of racketeering acts, then you must determine, as the fifth element, whether, in committing these racketeering acts, the defendant was conducting or participating in the affairs of the enterprise.

> Put simply, the government must prove that there is a meaningful connection between the defendant's charged acts of racketeering and the enterprise. The Government is not required to prove that the defendant you are considering participated in the management or control of the enterprise, or that he shared in its profits. The defendant may have been a subordinate in the enterprise, acting under the direction of a higher-level manager.
>
> The government is required to prove, however, either that the acts of racketeering by the defendant you are considering were in some way related to the affairs of the enterprise, or that the defendant was able to commit these acts solely by virtue of his position or involvement in the affairs of the enterprise."

Petitioner submits that charge is no longer legally correct, but reflects prior Circuit law which was overturned by a decision of the United States Supreme Court in *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 (1993). Therein it was held that to conduct or participate, directly or indirectly, in the conduct of such enterprises affairs within the meaning of section 1962(c), requires that one must participate in the operation or management of the enterprise itself.

Subsequently, it was emphasized and reiterated in the Second Circuit's holding in *Napoli v. United States*, 45 F.3d 680, 682 (2d Cir. 1995), that section 1962(c) requires that a defendant have a degree of direction, or some part in the direction of a criminal enterprise in order to support a RICO conviction.

Contrary to the Second Circuit Court of Appeals holding at page "3" of its Summary Order, petitioner's claim should be reviewed de novo, and not by the standard of plain error. However, under any standard the Court's charge is fatally defective. Due Process requires jury instructions that inform the jury that the State must prove each and every element of the crimes charged beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307, 313 (1985). See also, *United States v. Smith*, 939 F.2d 9 (2d Cir. 1991) [District Court's failure to instruct the jury on essential elements of the charged offense required reversal under either the plain error or harmless error analysis]. Here the Court's jury instruction reduced the Government's burden to prove a crucial element of section 1962(c) as defined and established as aforesaid by the United States Supreme Court. The instant trial jury had only to find that petitioner's alleged acts of racketeering were in some way related to the affairs of the enterprise, or that petitioner was able to commit these acts solely by virtue of his position or involvement in the affairs of the enterprise. Proof of petitioner's direction or management of the enterprise was not required. The trial Court's error was tantamount to the Court directing a verdict in favor of the Government.

The jury instruction imposed a lesser obligation of proof upon the Government in violation of Due Process of Law. Contrary to the holding the Second Circuit Court of Appeals at page "4" of its Summary Order, there was no evidence before this jury that petitioner participated in the operation or management of the enterprise charged, nor was there any evidence in the trial record that the Genovese Crime Family was the RICO enterprise

charged. The Government's summation was the only reference in the entire case to petitioner exercising operational or management authority over the charged enterprise. The evidentiary record is barren, except based on guess and surmise.

CONCLUSION

For the foregoing reason a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

DATED: June 7, 1996.

Submitted by,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

94-cr-119
SDNY-nyny

Patterson

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 14th day of March, one thousand nine hundred and ninety-six.

PRESENT: HON. J. EDWARD LUMBARD,
HON. ROGER J. MINER,
HON. DENNIS G. JACOBS,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

RUDOLPH SANTOBELLO and
CHARLES DESALVO,
also known as Charlie,

Defendants-Appellants.

95-1173
95-1452

(Filed Mar. 14, 1996)

APPEARING FOR APPELLANTS	B. Alan Seidler, Nyack, NY.
APPEARING FOR APPELLEE:	Douglas M. Lankler, Assistant United States Attorney for the Southern District of New York, New York, NY.

UPON CONSIDERATION of this appeal from judgments of the United States District Court for the Southern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgments be and hereby are AFFIRMED.

This cause came on to be heard on the transcript of record and was argued by counsel.

Defendants-appellants Rudolph Santobello and Charles DeSalvo appeal from judgments of conviction and sentence entered in the United States District Court for the Southern District of New York (Patterson, J.). Santobello was convicted, after a jury trial, of racketeering conspiracy in violation of 18 U.S.C. § 1962(d), racketeering in violation of 18 U.S.C. § 1962(c), conspiring to collect unlawful debts in violation of 18 U.S.C. § 1962(d), conspiring to make extortionate extensions of credit in violation of 18 U.S.C. §§ 891, 892, 893, and 894, gambling conspiracy in violation of 18 U.S.C. § 1955, and operating illegal gambling businesses in violation of 18 U.S.C. § 1955. Santobello was sentenced to a 78-month term of imprisonment, a three-year term of supervised release, a $50,000 fine, and a $500 special assessment. DeSalvo was convicted, after a jury trial, of racketeering conspiracy in violation of 18 U.S.C. § 1962(d), racketeering in violation

of 18 U.S.C. § 1962(c), gambling conspiracy in violation of 18 U.S.C. § 1955, and operating illegal gambling businesses in violation of 18 U.S.C. § 1955. DeSalvo was sentenced to a 24-month term of imprisonment, a two-year term of supervised release, and a $250 special assessment.

The Genovese Crime Family (the "Family") was an organized criminal enterprise engaged in gambling and loansharking throughout the New York metropolitan area. The Family was organized into "crews" of "made members." Other individuals, known as "associates," were not "made members" of the Family but assisted them in their criminal activities. Each crew was headed by a "caporegime," also known as a "capo" or "captain," who supervised the activities of crew members and associates.

According to evidence at trial, beginning in at least 1990, Santobello was a capo of the Family, and supervised a crew from his headquarters at a social club at 2343 Arthur Avenue in the Bronx ("Club Arthur"). DeSalvo was an associate of Santobello's crew and often visited Santobello at Club Arthur. One of the illegal activities conducted by Santobello's crew was loansharking. From early 1991, Santobello and his partner, Daniel Cilenti, made and collected extortionate extensions of credit. Evidence also showed that, in August and September of 1992, Santobello used a storefront at 2500 Arthur Avenue in the Bronx to run craps games. Santobello supervised the operation, and Santobello's associates, including DeSalvo, Benjamin Castellazzo, Anthony Sedotto, and Frank DiVito, handled the day-to-day management of the games. In addition, Santobello conducted a numbers

operation. From Club Arthur, Santobello received wagers and reports on the winning numbers, and he calculated the payments to be made to the winners.

Santobello also was involved in bookmaking operations. In the spring of 1993, Santobello sent DeSalvo to work at a bookmaking parlor at 844 Morris Park Avenue. DeSalvo generated profits by charging losing gamblers interest of up to 20%. DeSalvo and the other operators would attempt to reduce their losses by "laying off" bets to other bookmakers, if one side in a sporting event became too heavily favored by gamblers. From the spring of 1992 through October of 1992, Santobello also was involved in a bookmaking operation run by his associates, Joseph Sarcinella, Joseph Spano, and Joseph Silvestri.

On August 31, 1994, a 13-count superseding indictment was filed, charging Santobello, DeSalvo, and seven co-defendants with various crimes related to their association with the Family. After the superseding indictment was filed and prior to trial, five co-defendants – Cilenti, Castellazzo, Vito Raguso, Sarcinella, and Silvestri – pleaded guilty. The trial of Santobello, DeSalvo, and two co-defendants commenced on September 26, 1994.

On October 24, 1994, Santobello was convicted on ten counts and DeSalvo was convicted on five counts. On March 27, 1995, Santobello was sentenced to a 78-month term of imprisonment, a three-year term of supervised release, a $50,000 fine, and a $500 special assessment. On July 18, 1995, DeSalvo was sentenced to a 24-month term

of imprisonment, a two-year term of supervised release, and a $250 special assessment. This appeal followed.[1]

Santobello and DeSalvo argue that the district court committed reversible error in instructing the jury on the § 1962(c) racketeering count. We disagree. Under § 1962(c), it is unlawful for any person associated with any enterprise "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." In *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1992), the Supreme Court held that " 'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must participate in the operation or management of the enterprise itself." *Id.* at 1173 (citation omitted).

The government concedes that the district court's jury instruction was erroneous because it did not include Reves' "operation or management" requirement. Because Santobello and DeSalvo failed to object to the erroneous jury charge, we review their claims for plain error. *See* Fed. R. Crim. P. 52(b). "Plain error is error so egregious as to result in a miscarriage of justice." *United States v. Thai*, 29 F.3d 785, 816 (2d Cir.), *cert. denied*, 115 S. Ct. 456 (1994). In previous cases in which *Reves* language has been omitted from a § 1962(c) jury charge, we have held that the error did not require reversal where the proof at trial demonstrated that the appellants had played some part in directing the affairs of the charged enterprise. *See United*

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[1] On September 12, 1995, this Court granted the government's motion to consolidate the appeal of DeSalvo with the appeal of Santobello.

States v. Wong, 40 F.3d 1347, 1374 (2d Cir. 1994), *cert. denied*, 116 S. Ct. 190 (1995); *Thai*, 29 F.3d at 816.

In the present case, the evidence showed that Santobello and DeSalvo helped direct the affairs of the Family. Santobello, as a capo in the Family, directed his crew's criminal activities. DeSalvo also played some part in managing certain Family activities. The Supreme Court noted in Reves that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants . . . who are under the direction of upper management." *Id.* at 1173. As a bookmaker, DeSalvo was responsible for making decisions on whether to hedge sports bets and generally for keeping the business profitable. In the craps operation, DeSalvo, as a dealer, was responsible for handling and monitoring the bets. Accordingly, the jury instruction on § 1962(c) was not plain error.

Santobello also argues that the district court erred in admitting excerpts of the plea allocutions of Cilenti and Sarcinella pursuant to Fed. R. Evid. 804(b)(3), and in excluding other portions of the plea allocutions. We reject this contention. Under Fed. R. Evid. 804(b)(3), a statement by an unavailable witness against his penal interest may be admitted into evidence. The statements in the plea allocutions of Cilenti and Sarcinella were against their penal interests, and thus properly admitted. *See United States v. Scopo*, 861 F.2d 339, 348 (2d Cir. 1988), *cert. denied*, 490 U.S. 1048 (1989). In addition, Cilenti's statement declining to name his associates, and the statement by

counsel for Sarcinella exculpating Santobello, were properly excluded, since these statements were not self-inculpatory. *See Williamson v. United States*, 114 S. Ct. 2431, 2435 (1994).

In addition, Santobello contends that the district court erred in determining at sentencing that his criminal history category was II. This claim is without merit. The district court properly found that the evidence demonstrated that Santobello had participated in a numbers operation under the control of the Family within 15 years of his prior 1971 conviction, resulting in an increase in his criminal history category. *See* U.S.S.G. §§ 4A1.1(a) and 4A1.2(e)(l).

DeSalvo argues that the evidence was insufficient for his conviction on racketeering conspiracy, racketeering, and operating the craps games at 2500 Arthur Avenue. Specifically, DeSalvo claims there was insufficient evidence that five or more persons conducted the craps games because there was no proof of the involvement of Frank DiVito, allegedly the fifth person. We disagree.

A defendant challenging the sufficiency of the evidence, following his conviction by the jury, "takes on a heavy burden." *United States v. Gelzer*, 50 F.3d 1133, 1142 (2d Cir. 1995). "An appellate court must view all of the evidence, whether direct or circumstantial, in the light most favorable to the government and must credit all inferences and credibility assessments that the jury might have drawn in favor of the government." *Id.* In the present case, there was sufficient evidence that DiVito was involved with the craps games. For instance, on August 28, 1992, just two weeks prior to the FBI's raid of the

craps games at 2500 Arthur Avenue, agents observed DiVito using a set of keys to open the storefront there. Shortly after DiVito opened the storefront, DeSalvo, Sedotto, and Castellazzo were seen arriving at the location, conferring with each other, and then entering the storefront. DiVito subsequently was observed allowing unknown persons to enter. Accordingly, there was sufficient evidence for the jury to find that DiVito was directly involved in the conduct of the craps games.

We have considered the remaining contentions of Santobello and DeSalvo, and we find them all to be without merit.

/s/ J. Edward Lumbard per RJM
HON. J. EDWARD LUMBARD,

/s/ Roger J. Miner
HON. ROGER J. MINER,

/s/ Dennis G. Jacobs per RJM
HON. DENNIS G. JACOBS,
Circuit Judges.